STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 26, 1999
v	No. 203995 Macomb Circuit Court
KURT RICHARD HAMILTON, Defendant-Appellant.	LC No. 95-000866 FC

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals his conviction on two counts of involuntary manslaughter, MCL 750.321; MSA 28.553. Defendant, after consuming an unspecified amount of beer, was driving down a two-lane highway in heavy, dense fog, passing vehicles and driving at a rate of speed that may have been in excess of the posted speed limit, but nonetheless exceeded prudent speeds given the weather conditions. When attempting to pass a slower moving vehicle, circumstances caught up with him, and he caused a head-on collision with an oncoming minivan, killing its driver and her 13-month-old son. We affirm.

I

Defendant argues that the trial court erred in denying his motion for a directed verdict on the second-degree murder charge. While defendant was ultimately convicted of the lesser offense of involuntary manslaughter, he maintains that allowing the jury to consider second-degree murder when the evidence was insufficient to support such a charge left open the possibility that the jury would reach an impermissible compromise verdict. We disagree and find the evidence was sufficient to convict defendant of second-degree murder.

Our Supreme Court recently addressed a similar question in *People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998). *Goecke* consolidated three cases where drunk driving led to fatalities and addressed the issue of whether there was sufficient evidence to charge or convict the respective defendants of second-degree murder.[1] In each case, the Court found that there was sufficient evidence to support the charge of second-degree murder.

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke, supra,* 457 Mich 442, 464 (citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996)). Malice is "the intent to kill, cause great bodily harm, or to do an act in the wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* (citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980)). While specifically declining to adopt an objective standard for the third form of malice, "wanton and wilful disregard," our Court noted that:

> Only a highly unusual case would require a determination of the issue whether the defendant was subjectively aware of the risk created by his conduct. [*Id.* (citing 2 LaFave & Scott, Substantive Criminal Law, § 7.4(b), p 205).]

Our Court ultimately found that under either standard, subjective or objective, sufficient evidence existed to charge and convict the defendants in *Goecke, supra* at 465.

Defendant's conduct in this case was particularly egregious, and we believe that "[a] jury could reasonably infer that the defendant placed himself in a position the results of which a reasonable person would know had the natural tendency to cause death or great bodily harm." *Goecke, supra,* 457 Mich 442, 471-472. Passing several cars while traveling well above a safe speed for the road conditions in the opposite lane of a fog-enshrouded two-lane road without headlights, after having imbibed not an immoderate amount alcohol, is to behave with wanton and wilful disregard of the likelihood that the natural tendency is to cause death or great bodily harm. Defendant's behavior could be construed as functionally equivalent to the malice demonstrated by the defendants in *Goecke,* supra.

Because there was sufficient evidence to convict defendant of second-degree murder, the trial court did not err in refusing to grant defendant's motion for a directed verdict on that charge.[2]

II

Defendant next argues that the trial court erred when it allowed a police officer to recount statements made by a passenger who was riding in defendant's car when it collided with the minivan. The officer interviewed the passenger the morning after the accident while the passenger was recovering in the hospital. The trial court admitted the testimony under MRE 803(24), the residual hearsay exception, finding that it had the requisite independent indicia of reliability. Defendant contends the trial court erred because the testimony did not meet the requirements of 803(24). We disagree.

Under MRE 803(24), hearsay testimony may be admitted when it does not fit squarely within an enumerated exception if the statement has "equivalent circumstantial guarantees of trustworthiness," "is offered as evidence of a material fact," "is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts," and "the general purpose of the Rules of Evidence and the interests of justice are best served by admission of the statement into evidence." In evaluating whether a statement is trustworthy, the inquiry is largely fact driven and circumstantial. *People v Welch*, 226 Mich App 461, 468; 574 NW2d 682 (1997). A court may consider, inter alia, the spontaneity of the statement, how often it has been repeated, whether

the declarant has any motivation to fabricate, and the reason for the declarant's unavailability at trial. *Id*. at 467. The guarantees of trustworthiness should serve as a "surrogate for the declarant's in-court cross-examination," such that actual cross-examination would be of "marginal utility." *Id*. at 467-468 (citing *United States v Shaw*, 69 F3d 1249, 1253 (CA 4, 1995)).

"The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). In this case, the trial court did not err in allowing the testimony. Contrary to defendant's claim that the testimony should be evaluated under the business records exception, FRE 803(6) and MRE 803(6), the written police report was not admitted into evidence. Rather, plaintiff only introduced the officer's testimony concerning the passenger's statements during the interview. The trial court properly found that the statements met the requirements of MRE 803(24) insofar as the officer interviewed the passenger the morning after the accident, the passenger was fully conscious, and his father and girlfriend were present during the interview. Furthermore, both the passenger and the police officer testified at the trial, so defendant had the opportunity to cross-examine both of them, and the jury could evaluate the witnesses' credibility. The trial court correctly found that the statements were offered to prove a material fact, not a collateral matter, and that the statements were more probative than other evidence, insofar as the passenger was the sole witness to defendant's consumption of alcohol before the collision and defendant's conduct at the time of the collision. In addition, at the time of defendant's trial, the passenger could not clearly recall the interview or the circumstances of the accident due to injuries sustained during the accident.

III

Defendant next argues that the trial court erred in admitting evidence of a previous drunk driving conviction under MRE 404(b) as evidence that the defendant had knowledge of the dangers of drunk driving. To be admissible under MRE 404(b), evidence of prior bad acts must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 338 (1993), modified 445 Mich 1205, 520 NW2d 338 (1994). Evidence is offered for an improper purpose if it is offered merely to show defendant's propensity to commit the charged offense. *Id*.

While we agree with defendant that the trial court erred in admitting the evidence of his prior drunk driving conviction, we hold that the error was harmless. Proving knowledge through bad acts is a category of 404(b) more susceptible to abuse than any other category. In the case of drunk driving, the knowledge is so generic and rooted in common sense that it is difficult to imagine that plaintiff needed to prove it extrinsically. Therefore, the prior drunk driving conviction was of little probative value, and we find that the trial court abused its discretion in admitting it. However, defendant was ultimately convicted of involuntary manslaughter, the elements of which include: (1) the killing of another without malice or intent but while doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm; or (2) while negligently doing some act lawful in itself; or (3) by the negligent omission to perform a legal duty. *People v Datema*, 448 Mich 585, 597; 533 NW2d 272 (1995). In its closing argument, plaintiff specifically stated that it was not arguing that defendant was

drunk at the time of the accident. There was overwhelming evidence that, even if defendant was not impaired by the alcohol, his behavior on the road demonstrated at least the degree of negligence required to find him guilty of involuntary manslaughter. Therefore, the error was harmless. *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998).

IV

Defendant next argues that plaintiff's remarks during closing argument constituted an improper appeal to the jury's sympathy for the decedents, a thirteen-month-old child and his mother. We evaluate claims of prosecutorial misconduct by evaluating the remarks in context. *People v LeGrove*, 205 Mich App 77, 82; 517 NW2d 270 (1994). In determining whether the alleged misconduct warrants reversal, we consider whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). While the prosecutor's remarks appeared designed to elicit sympathy for the victims, they were brief references to the harms caused by the defendant's conduct. Most of his argument focused on the evidence presented during the trial and the elements of the crimes with which defendant was charged. Furthermore, the trial court instructed the jury that the lawyers' remarks were not evidence and that it should base its decision only on the evidence. Therefore, when taken in context, we do not find that the remarks denied defendant a fair trial.

V

Defendant next argues that testimony from decedent's mother was not probative of any fact at issue in the trial and was substantially prejudicial. However, we note that defendant did not object to this testimony at trial below, and, finding no manifest injustice, find that the issue is unpreserved.[3] MRE 103(a), *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). See also *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

VI

Finally, defendant argues that even if we decide that none of the alleged errors by themselves deprived him of a fair trial, the compilation of errors warrants a new trial. We disagree. Whether reversal is required depends upon whether the defendant received a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). Based on our analysis of the above issues, we do not believe defendant was denied a fair trial. We found that the trial court did not err in refusing to direct a verdict on the second-degree murder charge, because there was sufficient evidence for the jury to convict defendant of second-degree murder. In addition, the police officer's testimony regarding the passenger's statements were properly admitted under MRE 803(24). Therefore, under the first two issues, we found no errors that would contribute to a case for reversal based on cumulative error. While we found that the trial court erred in admitting testimony regarding defendant's prior OUIL conviction, we found that the error was not prejudicial given the prosecutor's use of that information and the jury's ultimate verdict. Regarding the prosecutor's remarks during closing argument, we found that when taken in context of the entire argument and the trial court's jury instructions, defendant was not denied a fair trial. Finally, we found that the issue of whether decedent's mother's testimony was relevant was not properly preserved.

In summary, the only remaining basis for reversing the defendant's convictions is the trial court's admission of the 404(b) evidence and the prosecutor's closing remarks. We are not persuaded that the cumulative effect of these two errors deprived defendant of a fair trial.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] We note that there was no evidence in this case that defendant was legally intoxicated. Blood alcohol tests performed after the accident confirmed that his blood alcohol level was below the legal limit at the time the blood was drawn. There was, however, uncontroverted evidence that defendant had consumed some alcohol shortly before the accident, and the jury was free to consider that fact in determining culpability.

[2] Given our Supreme Court's recent clarification of the intent required for the second-degree murder, we decline defendant's invitation to specifically adopt a subjective standard.

[3] In his brief, defendant argues that trial counsel objected to this testimony, thereby preserving the issue for review. However, the context of his objection makes it clear that trial counsel only objected to a portion of the testimony and the introduction of decedent's photograph. Trial counsel offered no objection to the testimony as a whole.